

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

JIM AANA, ET AL., on behalf ) Case No. CV12-00231LEK-BMK  
of themselves and all others)  
similarly situated, )  
 )  
Plaintiffs, ) Honolulu, Hawaii  
 ) October 24, 2013  
v. ) 10:59 a.m.  
 )  
PIONEER HI-BRED )  
INTERNATIONAL, INC., ET AL., )  
 )  
Defendants. )

TRANSCRIPT OF

1) DEFENDANTS' MOTION FOR PROTECTIVE ORDER  
2) DEFENDANTS' MOTION FOR PROTECTIVE ORDER PURSUANT TO DOCKET  
NO. 330  
BEFORE THE HONORABLE BARRY M. KURREN  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording;  
transcript produced by transcription service.

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1 OCTOBER 24, 2013

10:59 A.M.

2 THE CLERK: The United States District Court for the  
3 District of Hawaii with Honorable Barry M. Kurren, United  
4 States Magistrate Judge presiding is now convened.

5 Case CV12-231LEK-BMK, Jim Aana, et al. v. Pioneer  
6 Hi-Bred International. Motion for -- hearing on defendants'  
7 motion for protective orders. Please make your appearances.

8 MR. SMITH: Good morning, Your Honor, Kyle Smith on  
9 behalf of the plaintiffs.

10 THE COURT: Good morning.

11 MR. FRIEDENBERG: Good morning, Your Honor, Adam  
12 Friedenbergr for the defendants.

13 THE COURT: Good morning.

14 MR. PURPURA: Good morning, Your Honor, Michael  
15 Purpura for defendants.

16 THE COURT: Good morning.

17 MR. SCANLON: Good morning, Michael Scanlon for  
18 defendants.

19 THE COURT: Good morning. So, you not only have  
20 killed every forest in the city, you also want to show a  
21 video in connection with the motions here today.

22 MR. FRIEDENBERG: It will be only a little bit of  
23 video, Your Honor, mostly aesthetic slides, but I did think  
24 because we've given the Court so many trees that it might be  
25 helpful to condense to the extent we can, and then highlight

1 a few important concepts.

2 THE COURT: It's been a long time since I've spent  
3 hours reading material in connection with a discovery motion,  
4 but that's -- that's what we had to do in connection with  
5 this.

6 Anyway, I do think we can get through this fairly  
7 quickly. Now, I have read everything carefully. Of course,  
8 I'm very familiar with the case. I would like to start out  
9 on the inspection.

10 And, Mr. Smith, I have a question that I wanted to  
11 ask you in connection with that to start with.

12 MR. SMITH: Sure.

13 THE COURT: And that is why do you feel you need to  
14 take soil samples? What would be the purpose for that?

15 MR. SMITH: There's a couple different reasons. So,  
16 one reason to take the soil samples is because when you take  
17 a sample you can then -- and I'm not the scientist doing  
18 this -- but essentially you can then do a -- I think it's  
19 called aspeciation -- or basically determines what the -- how  
20 dried out the soil is, what's the particle size, how  
21 destroyed, if it's clumped, this kind of thing.

22 And what that basically helps you do is then  
23 determine how likely that soil is going to get picked up by  
24 the wind. Now, that's reason one. Essentially, what it does  
25 is -- the way I understand it is they dry it out, and then

1 they say, look, within this silty soil, volcanic soil, you  
2 have extremely fine silt, you have clays, you have this.  
3 These silts are specifically very susceptible to wind  
4 erosion. Now, that's reason one.

5           The other reason that we would like to do soil  
6 sampling too -- and this is alleged in the complaint -- is  
7 that because of the long-term use of organic arsenical  
8 pesticides, these are things like -- particularly sugar cane,  
9 there's a large scale of contamination of former sugar cane  
10 fields on Kauai, Oahu, everywhere else with higher levels of  
11 arsenic quality.

12           So -- you can see it, in fact, around golf courses,  
13 because they use the same kinds of pesticides. So these  
14 pesticides, when they're sprayed, they then degrade into the  
15 environment into arsenic in the soil.

16           So if you're going to go out there and plow 1,000  
17 acres, right, over and over again, over and over again, and  
18 it's picking up soil, that's not good from the standpoint of  
19 the impact on the property.

20           THE COURT: Yeah, but, you know, this is a case in  
21 which you are seeking relief, you know, for property damage,  
22 not for personal injury or for health issues, and the like.  
23 So I don't see how that would be relevant to any of the  
24 issues that are actually involved in this case.

25           MR. SMITH: Well, here's the reason. Is that if

1 you're contaminating Waimea just with dust there's a property  
2 impact, right? If you're contaminating Waimea with arsenic  
3 leadened dust, then it's a much more severe concern for the  
4 community. That's why we want to know.

5 THE COURT: Well, you know, that may be --

6 MR. SMITH: Correct.

7 THE COURT: -- but, you know, maybe you should go to  
8 the EPA --

9 MR. SMITH: Sure.

10 THE COURT: -- and have them conduct testing for  
11 that purpose. I can certainly understand the concern of the  
12 community, but that's not what this lawsuit is really all  
13 about.

14 MR. SMITH: Sure.

15 THE COURT: Okay. Well, this is really the first  
16 that I've heard of the first purpose --

17 MR. SMITH: Right.

18 THE COURT: -- in determining how dry this soil  
19 is --

20 MR. SMITH: That's right.

21 THE COURT: -- so that you can -- it supports the --  
22 the argument about how freely it might travel to your  
23 clients' homes, right?

24 MR. SMITH: Yes. Well --

25 THE COURT: Okay. So why should they not be able to

1 do that?

2 MR. FRIEDENBERG: Well, as Your Honor noted this is  
3 the first, essentially, that we're hearing of it. There has  
4 been no expert declaration to establish the threshold  
5 proposition that this is plausible or that it is something  
6 for which sampling of this particular soil is necessary.  
7 There's been no threshold showing that there is some reason  
8 to conclude that the soil --

9 THE COURT: Well, do you need to do that in order to  
10 conduct an inspection? I mean that's a chicken and the egg.  
11 I mean if that's part of their theory -- well, actually it's  
12 a good point. Do you have an expert that's working with you  
13 on this particular subject on this point?

14 MR. SMITH: We do.

15 THE COURT: Okay. And this expert has indicated  
16 that he or she needs that type of evidence in connection with  
17 supporting the opinions.

18 MR. SMITH: Sir, it was their idea as far as the  
19 soil testing part.

20 THE COURT: Right.

21 MR. SMITH: Now, look I -- could we get around -- I  
22 mean, look if you tell us not to do it we're going to make  
23 do, right. But from the standpoint of being able to know  
24 what those soil characteristics are up on the plateau, you  
25 can then say when this soil moves into the air, you're going

1 to have very find levels of dust below, whatever --

2 THE COURT: Okay.

3 MR. SMITH: -- that kind of thing. So that's --

4 THE COURT: I'm sorry, I didn't mean to cut you off,  
5 but go ahead.

6 MR. FRIEDENBERG: No --

7 THE COURT: Go ahead. You can finish on this point.

8 MR. FRIEDENBERG: -- well, yeah, and just to respond  
9 further to Your Honor's question about why the first point  
10 doesn't justify the soil sampling, the issue in this case is  
11 not what kind of soil we're dealing with, but whether the  
12 soil is being transported by wind from Pioneer's property to  
13 the plaintiffs' property. And, if so, whether Pioneer has  
14 adopted or has taken steps -- reasonable steps to mitigate  
15 those impacts and to mitigate that circumstance.

16 And so, looking at the dirt on Pioneer's property  
17 doesn't tell you anything at all about that.

18 THE COURT: Well, you know, I suppose here --  
19 actually, I came into Court on this particular point thinking  
20 I would not allow this aspect of the inspection, but as I've  
21 heard, you know, Mr. Smith, articulate this and in thinking  
22 about the points that you're just discussing, you know, it  
23 seems to me that if -- there is a question about how  
24 reasonable the -- you know, your clients efforts were to  
25 mitigate against this dust from -- you know, from spraying or



1 traveling to the adjacent property.

2 If the work in connection with these fields is  
3 creating a type of soil that is so dry that it more easily  
4 does become a problem here, you know, might that bear on that  
5 issue? And I'm just sort of talking out loud about this now.

6 MR. FRIEDENBERG: Yeah, what I would say, Your  
7 Honor, is that absent some threshold showing that that is a  
8 theoretical possibility, then the claim of relevance is  
9 entirely conjectural and entirely speculative, and we've --  
10 as Your Honor has pointed out, we have put on your plate a  
11 lot of paper in connection with these motions and what has  
12 been completely -- what is completely absent from all that  
13 paperwork is any substantiation to that sort of a theory.

14 And so, unless you have an expert who can say the  
15 composition of the soil or the nature of the soil is relevant  
16 to whether that soil is being transported by wind from point  
17 A to point B, then there hasn't been any showing to justify  
18 the relevance of the discovery or that it's likely to lead to  
19 the discovery of admissible evidence.

20 THE COURT: Okay. Okay.

21 MR. FRIEDENBERG: And that's the record that we have  
22 before us.

23 THE COURT: Okay. I understand your point. So is  
24 there anything else you want to talk about specifically on  
25 the inspections. I've read everything that you've -- you

1 know, you've identified. So you don't need to go through it  
2 all, but if there's something in particular that you want  
3 point out here today that you feel needs to be elaborated on  
4 or discussed.

5 MR. FRIEDENBERG: Sure. Maybe what I'll do at this  
6 point is go through the presentation we brought for Your  
7 Honor --

8 THE COURT: Okay. You know --

9 MR. FRIEDENBERG: -- and I'll go through it quickly.

10 THE COURT: -- okay.

11 MR. FRIEDENBERG: -- or if you would prefer to go --

12 THE COURT: Well, you don't need to go through the  
13 whole dog and pony show, if that's what you want to do,  
14 because I mean I'm well familiar with the issues that you've  
15 raised and that have been countered and discussed.

16 And so --

17 MR. FRIEDENBERG: Okay.

18 THE COURT: -- I mean I sort of have in mind what I  
19 want to do here on this, but I mean if there's something that  
20 you feel that you haven't been able to explain well enough or  
21 identify clearly enough -- I mean you most definitely have  
22 made a record, and, Mr. Smith, you've made a record.

23 So I mean, you know, you've got a record, but, you  
24 know, I'm happy to hear or see whatever you want to show, but  
25 I just don't need you to go through it all.

1 MR. FRIEDENBERG: Okay. Well, I don't want to waste  
2 any more of your -- or any of Your Honor's time, so on the  
3 sampling I would just point out, and I think Your Honor is  
4 already there, but the notion that the chemicals -- or that  
5 if there are chemicals present in the soil that is somehow  
6 relevant in this case is completely wrong.

7 There is no personal injury claim, there is no claim  
8 for increased likelihood of injury, which would be a personal  
9 injury claim, and there's --

10 THE COURT: Right.

11 MR. FRIEDENBERG: -- the notion that you're anxious  
12 about the possibility that you might be exposed to something  
13 that could cause a personal injury is not something that's  
14 actionable either in Hawaii or on the claims that are  
15 alleged.

16 THE COURT: Okay. I agree with that point.

17 MR. FRIEDENBERG: Okay.

18 THE COURT: Okay. Mr. Smith.

19 MR. SMITH: Could -- I just want to respond to that  
20 very brief point. So -- and maybe just explain that -- the  
21 way that we conceptualize it.

22 So if I have a client, and she's in her home, and  
23 she's upset about dust, and she's smelling odors, and she's  
24 worried that she's being -- her, her grandkids, and her  
25 family is being exposed to pesticides, right, and she says

1 this has really impacted my use and enjoyment of the  
2 property. All right. She can do that. And we know now  
3 that -- what pesticides they're spraying, and we can do  
4 models and other things to show how those pesticides would  
5 get down into the town.

6 Well, what the jury's going to want to know though,  
7 and this impacts whether or not that claim for her fear is  
8 really valid or valuable, I should say, is they're going to  
9 want to know is that a rational fear. Is this just some  
10 frankly --

11 THE COURT: There's no such claim in this case for  
12 that though.

13 MR. SMITH: -- for use and enjoyment of property,  
14 sure there is. So we showed that that's a reasonable,  
15 rational fear for our people. It's not just we're making  
16 stuff up. They really are smelling stuff. This carries real  
17 risks, and their fear for their family, for their health, is  
18 real. That's the distinction. That's why we think it's  
19 relevant.

20 We're not arguing. We're not arguing that --

21 THE COURT: So you are seeking damages for emotional  
22 distress.

23 MR. SMITH: Well, certainly for use and enjoyment of  
24 your property. It impacts how much this has taken away from  
25 your ability to go have a hibachi with your grandkids.

1 You're not going outside, because you're worried about your  
2 exposing them to pesticides.

3 The jury's going to say, well, there's no evidence  
4 in this case to show how dangerous these pesticides even are  
5 or what you're being exposed to. That's what we're afraid  
6 of.

7 So we can show now -- what we're endeavoring to show  
8 is these pesticides do come into the community. They do  
9 carry severe health threats. That's why the health risks are  
10 relevant.

11 THE COURT: Well -- but he knows what the pesticides  
12 are that are being used on the fields; doesn't he?

13 MR. SMITH: Yes.

14 MR. FRIEDENBERG: He most certainly does, Your  
15 Honor.

16 MR. SMITH: Yes, we do.

17 MR. FRIEDENBERG: We've produced extensive  
18 information on that.

19 THE COURT: Right.

20 MR. SMITH: Right.

21 THE COURT: So, I mean, you have that information.

22 MR. SMITH: You're right. We do. We do. And as  
23 far as it relates specifically to testing on the fields, to  
24 draw back to the original point, the reason we thought that  
25 was relevant is this history of arsenic contamination --

1 THE COURT: Uh-huh.

2 MR. SMITH: -- I'll tell you this history of damage  
3 from sugar cane agriculture was raised by defendants very  
4 early on in mediation that there was historic damage to the  
5 soil structure from sugar cane fields. That's the first  
6 piece of the testimony. It's also well known that there's  
7 arsenic contamination.

8 So if I'm Pioneer, you know, a very sophisticated  
9 farmer that comes into the community, and we say, okay, we've  
10 got fields and in the history of arsenic contamination we  
11 have historic soil structure damage, what kind of steps are  
12 we going to take to protect the Waimea River, to protect the  
13 Waimea community?

14 That's why we see it being relevant, but obviously,  
15 you know -- and frankly, if we do soil sampling for -- we  
16 don't need very many. We would do a few -- I don't know,  
17 maybe three sites. It's basically just a bucket of soil, and  
18 you wrap it up. You can test that piece for arsenic once  
19 it's in our possession. You don't have to run around and do  
20 a bunch of different places. It's not very -- it's not as  
21 onerous as it's been made to sound, I guess.

22 THE COURT: Yeah. Well, I mean that's not -- I mean  
23 that's not -- I meant that's not really the problem, I  
24 think --

25 MR. SMITH: Right. I understand.

1 THE COURT: -- you know, here anyways.

2 MR. SMITH: I do.

3 THE COURT: Okay.

4 MR. SMITH: And I just want to make sure the Court  
5 understands our rationale for why we think that's --

6 THE COURT: Okay.

7 MR. SMITH: -- why that's relevant.

8 THE COURT: Okay. Okay.

9 MR. SMITH: Thank you, Your Honor.

10 THE COURT: Is there anything else you wanted to  
11 talk about on the inspection side or are you --

12 MR. SMITH: The other big issue is just the  
13 pesticide storage.

14 THE COURT: Right.

15 MR. SMITH: If you keep us from going and taking  
16 pictures of that, I'm not going to lose a whole lot of sleep,  
17 but on the other hand, the fact that when we did the OIP  
18 request and there are past violations of not keeping correct  
19 pesticide records --

20 THE COURT: Right.

21 MR. SMITH: -- and this kind of stuff, for me I  
22 would love to have pictures of where they keep their  
23 pesticide storage. I would love to have pictures of their --  
24 for example, in another case we have a pesticide sprayer, and  
25 one of the sprayers is supposed to be pointing back or kind

1 of like that, and they have spray nozzles pointing straight  
2 up, so when they spray it blows it up in the air. That's why  
3 we want to get those pictures.

4 THE COURT: Did you ask for any photographs, by the  
5 way, of any the applicators -- pesticide applicators?

6 MR. SMITH: The people or the actual --

7 THE COURT: No, the machinery used to actually apply  
8 the pesticides, did you ask for it?

9 MR. SMITH: I don't -- to be honest with you, Your  
10 Honor, I don't know. Maybe we didn't. I'm not sure, Your  
11 Honor.

12 THE COURT: I mean you asked for everything else  
13 under the sun.

14 MR. SMITH: We tried.

15 THE COURT: And you missed that one.

16 MR. SMITH: Yeah, maybe. I don't think so. I think  
17 we -- I'm not sure, Your Honor.

18 THE COURT: Okay. Okay. Anything else you wanted  
19 to say? And I'm ready to, you know, rule pretty soon on the  
20 objections.

21 MR. FRIEDENBERG: Let me just briefly, Your Honor.  
22 Mr. Smith does not represent the Waimea River, and he does  
23 not represent the Waimea community. What he represents are a  
24 number of individual property owners who are claiming  
25 interference with their property.



1           And what plaintiffs are doing is a very -- in a very  
2 artful way, trying to conflate that concept and that cause of  
3 action with a claim for fear of health risks. The latter  
4 claim does not exist under Hawaii law, and even if it did,  
5 the plaintiffs themselves have said, unambiguously, in each  
6 of the six or seven complaints they filed in these cases, and  
7 I want to get the quote accurately, but they have said in the  
8 Footnote 37, in their most recent pleading that they  
9 disclaim -- I'm sorry, "This complaint does not allege  
10 individual personal injuries on behalf of Waimea residents"  
11 period. They have disclaimed personal injury. The  
12 caption -- or rather the complaint is captioned as for  
13 property related claims.

14           Now, certainly, if someone is using their property  
15 less, or using it differently, or having it interfered with,  
16 because they are smelling things, or because dust is being  
17 transported from Pioneer's operations to their property, then  
18 that is in theory a cognizable nuisance claim. But that has  
19 nothing to do with this idea that the chemicals are  
20 dangerous, because they're not making a claim for emotional  
21 distress, and they're not making a claim for personal injury.

22           THE COURT: Right. Okay. Let me just ask you one  
23 question. I did want to raise one issue. On the actual  
24 machinery that is used to apply the pesticides, why should  
25 they not have an opportunity to see what was actually used?

1           MR. FRIEDENBERG: Well, because again it's not  
2 relevant to any disputed fact in the litigation. The  
3 question is whether these pesticides are being transported  
4 from -- one, whether they're coming from Pioneer's premises  
5 to the plaintiff's premises; and, two, whether that's  
6 creating any interference with the plaintiff's use of their  
7 property.

8           This concept that we're afraid of pesticides and  
9 that's what we're suing for is not a concept recognized by  
10 the law, and it's not one that they're alleging, so --

11           THE COURT: Yeah, but you maintain in defense that  
12 you do this in a customary, and acceptable, and appropriate  
13 industry type of manner, so that that protects you.

14           MR. FRIEDENBERG: Sure, Your Honor, and if they want  
15 to ask what type of equipment that we -- that Pioneer uses in  
16 its operations, they can, and they have.

17           THE COURT: Okay.

18           MR. FRIEDENBERG: And so, they have that information  
19 already. Going into a warehouse and -- or a storage room and  
20 taking a bunch of photographs of parked equipment and barrels  
21 of chemical don't tell you anything that's relevant to any  
22 disputed fact in this case.

23           THE COURT: Okay.

24           MR. FRIEDENBERG: It's all about taking pictures for  
25 use in connection with political activism. It's about laying

1 the groundwork for future cases that the plaintiffs' lawyers  
2 might like to bring, but it has nothing to do with whether  
3 dust is causing people to buy new drapes and repaint their  
4 houses.

5 THE COURT: Okay. I'm ready to rule on the  
6 inspection side of this.

7 So as I mentioned at the outside, because this is a  
8 case in which the plaintiffs' seek relief for property  
9 damage, I think much of what they want to do here really goes  
10 well beyond that. So I do think some limitations are  
11 appropriate as far as the inspection's concerned.

12 First of all, there is no question that they have a  
13 right to inspect the property. To all of the mitigation  
14 efforts, the wind protective devices, and the like that have  
15 been identified they have a right to -- you know, to look at  
16 that, to inspect the fields, to see where they are in  
17 relation to where their clients live, and I don't think that  
18 really is in dispute here.

19 I do not think there is any relevance -- any reason,  
20 for purposes of the discovery in connection with the issues  
21 in this case, to inspect the storage facilities, and for the  
22 reasons that have been identified.

23 On the soil sampling, I'm going to say no for now,  
24 but if there's an expert that would provide an appropriate  
25 basis for permitting that down the road, you know, we can

1 talk about it, but at this point I think the argument is well  
2 taken that the composition of the soil -- it really hasn't  
3 been shown that the composition of the soil really has any  
4 relevance for purposes of the property damage claims here.  
5 So I'm not permitting that.

6 I am going to permit the inspection of the machinery  
7 that is used to apply the pesticides. I do think there is an  
8 appropriate connection to the manner in which, you know, the  
9 pesticides are applied that would relate to the  
10 transportation of the pesticides to the adjacent property.  
11 So I will permit that.

12 And I do think they're entitled to photographs, one  
13 way or another, whether you provide them or whether they take  
14 them, of the machinery to be used in this case -- for  
15 purposes of this case. Okay.

16 Now, you don't need all day for this inspection.  
17 You don't need to bring the world to the fields. So, you  
18 know, if I were to say, you know, the time that you will  
19 have, you know, that would be as arbitrary as just picking  
20 something out of the sky. I mean I know actually far less  
21 than you folks know about, you know, the work and the layout  
22 of the fields and everything else here.

23 So it certainly strikes me that, you know, maybe  
24 about half of that time would probably be sufficient, but I'm  
25 not going to set any specific time frame now unless you can't

1 agree after you further confer about this.

2 And, you know, certainly you and Mr. Jervis, I guess  
3 that's who you -- as far as attorneys are concerned that you  
4 want to go out there, I don't really have a problem with  
5 that, you know, with a consultant who is working with you on  
6 this, it seems appropriate --

7 MR. SMITH: Right.

8 THE COURT: -- and maybe some assistant. That  
9 strikes me as probably what you need here.

10 MR. SMITH: I agree.

11 THE COURT: Okay. So you work with the other side  
12 on this and work out an appropriate inspection.

13 Have I covered everything that's relevant here as  
14 far the inspection is concerned?

15 MR. SMITH: Yes.

16 MR. FRIEDENBERG: I believe you have, Your Honor.

17 THE COURT: Okay. Okay. Good. So on the other  
18 side of things on the motion. You know, I guess, Mr. Smith,  
19 one thing I would say, I don't think it's really fair to  
20 compare, you know, your discovery versus their discovery as  
21 far as depositions are concerned.

22 I mean, you know, you've got hundreds of plaintiffs  
23 here who've got -- each of them has their own individual  
24 claim. In fact, you know, it was you at the outset that  
25 suggested to them to take 100 depositions or whatever it was,

1 the better way to get the discovery.

2           So I mean it doesn't have to be equal, you know, to  
3 be fair about things here. Now, I don't certainly mean to  
4 cut you off at the pass, but to say since they've taken, you  
5 know a ton of depositions, I should take a ton of  
6 depositions. That -- you know, that's not the way we do  
7 things here.

8           MR. SMITH: Your Honor, they have never said that  
9 and, more importantly, we've never done that. So -- not what  
10 you're saying as far as -- we have no intention to do 5,000  
11 deposition -- or interrogatories. We have no intention to do  
12 100 or 50 depositions of everybody. What --

13           THE COURT: Okay. Well, I've looked at your brief  
14 here and, you know, it certainly appears reasonable to take  
15 the deposition of Charles Okamoto, Bruce Robinson, this Rich  
16 Meyers, Russell Burnett.

17           I don't see where you need to take additional  
18 depositions with regard to lease negotiations, however.  
19 Haven't you got enough information on that?

20           MR. SMITH: Well, if the witnesses who have  
21 produced, namely Mark Takemoto, have actually had any  
22 knowledge in lease negotiations, then we might have, but the  
23 fact of the matter is, with the exception of Charlie Okamoto,  
24 who I've only deposed as a 30(b)(6) on the initial  
25 disclosures, I don't think we've deposed anyone that has

1 substantial lease negotiation experience.

2           And the reason is, and it's alleged, and I'll  
3 reference the evidence, in some of these lease negotiations  
4 dust, and dust complaints, and Waimea community complaints  
5 were specific. And so, it -- the reason we want to do it is  
6 because this whole issue -- we obviously think the Robinson  
7 entities should be in the case.

8           THE COURT: Yeah, and, you know, actually while  
9 we're on that point --

10           MR. SMITH: Yeah.

11           THE COURT: -- there is another motion to dismiss  
12 that's teed up on this --

13           MR. SMITH: That's true.

14           THE COURT: -- that's going to be heard soon. I  
15 think we ought to hold off on the Robinson related discovery  
16 until that motion is heard.

17           MR. SMITH: Is that for and against our clients? I  
18 meant that's the problem when it happened before, is there's  
19 a motion to compel brought, there's a motion to dismiss teed  
20 up. In fact, Judge Kobayashi had even indicated her -- what  
21 were her inclinations and that she was going to dismiss them,  
22 and Robinson said, no, we want to go forward with all this  
23 discovery against you guys.

24           And so, an order on the motion to compel was  
25 awarded. And so, it's -- I understand what you're saying.

1 We're not entitled to do all the same number of depositions.  
2 It's different issues, but from our standpoint we're dealing  
3 with 15 years, three companies, a lot of different -- a large  
4 time frame, and that's why we think more than ten is  
5 justified. We're not arguing --

6 THE COURT: No, and I don't have a problem with  
7 that.

8 MR. SMITH: -- right. Now, as to the motion to  
9 dismiss, right now we're under a motion to compel that we've  
10 been trying to respond to Robinson discovery. And so, that's  
11 part of the fairness issue. It's like, so Robinsons are  
12 going forward with discovery against us, but we can't -- why  
13 are they not responding to our discovery.

14 THE COURT: What's that all about?

15 MR. FRIEDENBERG: Let me respond to that, Your  
16 Honor, and then there are a couple of other points I'd like  
17 to respond to with Your Honor's permission.

18 We served -- now, what Mr. Smith is arguing now is  
19 something that Your Honor has already decided long ago, the  
20 time to appeal it ran long ago. This is just trying to  
21 relitigate old issues that didn't make sense before and make  
22 even less sense now given Your Honor's rulings.

23 There has been no discovery by the Robinson  
24 defendants that is in some way specific to the Robinson  
25 defendants. The defendants collectively served discovery to



1 each of the plaintiffs, the requests were identical to each  
2 of the plaintiffs, and they asked about the things we've  
3 talked about with Your Honor at many hearings before now that  
4 we've required many hearings with Your Honor to get, and this  
5 is basic information about what they're claiming and what  
6 their damages are, and so on.

7           So it may be that given that the numerical  
8 requirements of the Federal Rules apply to individual  
9 parties, it might have been that the Robinson defendants were  
10 the propounding party on some of the requests and Pioneer was  
11 the propounding party on some others --

12           THE COURT: Okay.

13           MR. FRIEDENBERG: -- but it's all discovery to the  
14 plaintiffs about the plaintiffs' claims.

15           THE COURT: Okay.

16           MR. FRIEDENBERG: Now, I want to get back to --  
17 well, it sounds like what Your Honor is contemplating is that  
18 we stay all the discovery to the Robinson defendants --

19           THE COURT: Right.

20           MR. FRIEDENBERG: -- pending Judge Kobayashi's --

21           THE COURT: Because you're challenging the new  
22 complaint on a motion to dismiss --

23           MR. FRIEDENBERG: -- that would be dispositive --

24           THE COURT: -- on the basis of the pleadings and  
25 there -- you know, it's a lot they want to do with respect to

1 that, and rather than really get into the weeds on that, I  
2 think that motion, you know, ought to be heard and resolved.

3 MR. FRIEDENBERG: -- and -- yes. That's exactly  
4 what we're saying.

5 THE COURT: Okay. And that's what I'm going to do  
6 on that, Mr. Smith, okay.

7 MR. SMITH: I --

8 THE COURT: And I don't see this -- you know, now I  
9 have a better understanding, and it's just the discovery that  
10 all the defendants, as a group, you know, presented to you.  
11 It wasn't anything specific to the Robinsons, right?

12 MR. SMITH: Well, what happened is we objected to --  
13 and it's not -- okay. So, first, on the important issue, if  
14 that's your ruling we can live with that.

15 THE COURT: Okay.

16 MR. SMITH: Let's punt it, because it is a motion to  
17 dismiss, it's on the pleadings, I can live with that. Okay.  
18 So that's not at an issue.

19 As far as the specific question is that the  
20 discovery was served against us, it's not identical discovery  
21 to every claimant. It's broken up in lots of different sets,  
22 so that there's a set for a husband, there's a set for a  
23 wife, a set for a renter.

24 We objected to the number of interrogatories as  
25 above and beyond -- Pioneer, for example, gets 25, and they

1 said, no, it's 25 from Pioneer, 25 from the Robinsons, 25  
2 from --

3 THE COURT: Oh.

4 MR. SMITH: -- that's what we get, you know. And  
5 so, that was their position that every defendant gets the  
6 full amount, and then they served close to that amount.

7 And so, we didn't turn around and serve discovery  
8 from every single one of our claimants --

9 THE COURT: Right.

10 MR. SMITH: -- we've got about 50, 60 for the  
11 Robinsons. It's about the same -- it's basically the same  
12 set against each of the defendants.

13 So -- but I can live -- the important thing is that  
14 your actual issue is to delay it until after the outcome of  
15 Judge Kobayashi.

16 THE COURT: Right.

17 MR. SMITH: I can live with that.

18 THE COURT: Okay. Okay. So other than the  
19 depositions that I've identified are there any other  
20 depositions that you're intending -- that you feel you need  
21 to have, you know, at this point?

22 MR. SMITH: The -- well, the 30(b)(6) of Pioneer to  
23 have someone answer for them is very important.

24 THE COURT: Okay. What about that?

25 MR. FRIEDENBERG: Well, they've already taken a

1 30(b)(6) deposition --

2 MR. SMITH: No.

3 MR. FRIEDENBERG: -- of Pioneer and the rules say  
4 that that 30(b)(6) notice is a notice to depose a party.  
5 They have deposed the party. The fact that the party is a  
6 corporation doesn't mean you get to go back to the well over,  
7 and over, an over again.

8 And I do want to point out that even though we are  
9 tabling for now the discovery of the Robinson defendants, I  
10 want to correct something that Mr. Smith represented to you  
11 that was incorrect.

12 He said that he's deposed Mr. Okamoto, but only as a  
13 30(b)(6) witness. Well, this goes back a ways, because Mr.  
14 Okamoto, I believe, was either the first or second deposition  
15 in the case. But at that deposition, Mr. Smith started to go  
16 far beyond the 30(b)(6) categories. I objected. It  
17 continued.

18 At one point, I instructed the witness not to  
19 answer, and Your Honor intervened. And what Your Honor said,  
20 at that time, was that a 30(b)(6) deposition notice is not  
21 limited to the 30(b)(6) categories. And so, you allowed Mr.  
22 Smith to take a broad deposition of Mr. Okamoto.

23 So the idea that a 30(b) -- that a deposition,  
24 because he was produced pursuant to the 30(b)(6) notice is  
25 only a narrow 30(b)(6) deposition is simply false, and it's

1 at odds with Mr. Smith's position and with Your Honor's  
2 ruling.

3 Now, on the Pioneer depositions that you've  
4 mentioned, Mr. Meyers and Mr. Burnett, what I would argue is  
5 that there has been no showing of the particularized need of  
6 the specific facts that these --

7 THE COURT: He's given enough information here, if  
8 that's correct, to take those depositions.

9 MR. FRIEDENBERG: Well, what I would argue is that  
10 all he has given you is information that suggests that these  
11 people are now -- may be knowledgeable regarding subjects  
12 that -- on which other witnesses already have been deposed,  
13 and I would submit that the Finazzo case that Judge Kobayashi  
14 decided --

15 THE COURT: Right.

16 MR. FRIEDENBERG: -- and some others we've cited to  
17 Your Honor --

18 THE COURT: Right.

19 MR. FRIEDENBERG: -- say that once you're beyond the  
20 10 that's not good enough. What you have to show is why a  
21 witnesses 11, 12, 13, and 14, have some different knowledge  
22 or some superior knowledge, or some knowledge that wasn't  
23 attainable from witnesses 1 to 10, and isn't attainable from  
24 some other less burdensome and intrusive means. And on  
25 that --

1 THE COURT: Yeah, but this is not a case where we're  
2 strictly following, you know, 10 on each side.

3 MR. FRIEDENBERG: Well, let me respond to that, Your  
4 Honor, and I take your point, and I also take the point made  
5 at the outset, which is that to try to make an equivalence  
6 between --

7 THE COURT: Right.

8 MR. FRIEDENBERG: -- our -- the number of  
9 depositions we're taking and the number of the depositions  
10 the plaintiffs are taking --

11 THE COURT: Right.

12 MR. FRIEDENBERG: -- is completely false.

13 THE COURT: Right.

14 MR. FRIEDENBERG: But I want to push back a little  
15 bit on this notion that's coming from the plaintiffs or  
16 that's being created by the plaintiffs that this is in some  
17 way an exceedingly complex case or a massive case that  
18 requires --

19 THE COURT: I know it's not complex.

20 MR. FRIEDENBERG: -- it's not. It's a case by one  
21 plaintiff against one defendant saying that you caused me a  
22 few thousand dollars or in some cases even less damage as a  
23 result of dust. And if this were one case, by one plaintiff  
24 against one defendant, there would be no question that the 10  
25 deposition rule should be respected.

1           The only reason why the case looks bigger from a  
2 case management perspective, is because all these plaintiffs  
3 hired the same lawyer, and banded together, and filed one  
4 suit, but if we were in 200 different courtrooms or in 200  
5 different matters, with each -- by one plaintiff against one  
6 defendant, I think you would be hard pressed to conclude that  
7 it was a case that required such broad, and expansive, and  
8 such a large number of depositions in discovery.

9           So that's the reason why or that's a fundamental  
10 reason why I would say that even these two depositions that  
11 Your Honor is focused on have not been sufficiently -- the  
12 need hasn't been sufficiently proved.

13           THE COURT: Okay. Well, I disagree on that, and I'm  
14 going to let him do Meyers and Burnett, but you've already  
15 deposed Okamoto in the manner that Mr. Friedenberg just  
16 indicated?

17           MR. SMITH: I don't disagree with parts of what he  
18 said. What happened was there was an initial disclosure made  
19 of five or six types of categories of documents for all  
20 defendants. We objected, and we said this needs to be more  
21 specific under the rules. They refused.

22           So then we noticed up a 30(b)(6) deposition limited  
23 to the initial disclosures for each of the defendants, so  
24 that we could figure out what kinds of things were out there  
25 before we went and did a bunch of discovery. Okay.

1           So I noticed up the 30(b) deposition. I get in with  
2 Mr. Okamoto. I have to go somewhat beyond that. I can't  
3 just say, well, what documents do you have. I have to say,  
4 well, were you involved in this, do you have documents of  
5 that kind, were you involved in this, do you have documents,  
6 do you have e-mails, do you have this, and Mr. Friedenberg  
7 started to object to the scope. You're going way beyond the  
8 scope of 30(b)(6), and then instructed his client not to  
9 respond.

10           That's when we called Your Honor, and you said you  
11 can go beyond the scope of just this narrow scope.

12           THE COURT: Okay.

13           MR. SMITH: And we made clear on that record, for  
14 sure -- and I won't --

15           THE COURT: And you did that.

16           MR. SMITH: -- and I did that, but it was clear on  
17 the record that I wasn't conducting a full deposition of Mr.  
18 Okamoto, and it was clear -- and I don't have the transcript  
19 in front of Your Honor, but look I'm not going to go back and  
20 ask these same kinds of questions of Mr. Okamoto again.

21           And, consequently, I didn't ask him about all kinds  
22 of stuff. We tried to limit it to the kinds of documents --

23           THE COURT: Okay.

24           MR. SMITH: -- they had available.

25           THE COURT: Okay. I'll let you finish up with Mr.



1 Okamoto. I'm going to let him do -- finish up with Okamoto,  
2 Meyers, and Burnett. You've done a 30(b)(6) deposition of  
3 Pioneer.

4 MR. SMITH: Only on the documents. And just to  
5 clarify the record on that, we had a dispute. In other  
6 cases, what I've done is we've said, here's the 30(b)  
7 deposition on this category for this defendant, they produce  
8 a witness. Here's a 30(b)(6) deposition on this category for  
9 that defendant. We got into a dispute, and he said, they  
10 didn't like that. They think that's improper. There should  
11 be one 30(b)(6) deposition notice with all categories, and  
12 then they tell you who they're going to produce, and you  
13 notice up those different 30(b)(6) depositions. That's fine,  
14 and there is an agreement that we would reproduce categories  
15 -- all the categories we wanted, which we've never done.

16 So the limited extent of the 30(b)(6) deposition  
17 that's occurred has only been those initial disclosures, and  
18 then it's gone beyond that to the extent I had to ask about  
19 what your background is to understand what documents they  
20 might have.

21 So I don't want to go back through all that. I've  
22 kind of done that piece. But, for example -- I mean as a  
23 perfect example, Charlie Okamoto. I didn't talk to him as  
24 far as his later, you know, in depth discussions, or what he  
25 knows now, or what -- you know, a lot of these different

1 kinds of things that would come out in the deposition.

2           So that's the distinction. It wasn't a 30(b)(6)  
3 deposition on all the categories we wanted. We did just that  
4 specific area. We tried to keep it limited to that area, and  
5 now we want to finish for the rest -- for the remainder of  
6 the categories. And, originally -- I mean correct me if I'm  
7 wrong -- but we had an agreement to do that.

8           Okay. And also on this 10 deposition limit, I  
9 agree. It's not -- well, first more than 10 depositions had  
10 kind of always been what everyone's anticipated this would  
11 take. And so, when we're working on that, and they say,  
12 well, we want to do all kinds of discovery, and I say my  
13 preference is for you to depose everyone, because then at  
14 least we get hard evidence of all these different clients.

15           And I give them my list of people I want to depose.  
16 They pick out the people -- hey, we'll give you this person,  
17 we'll give you this person. So I didn't --

18           THE COURT: But we're beyond that.

19           MR. SMITH: -- we are beyond that, but I guess the  
20 point I'm trying to make is that if I'd known from the  
21 beginning, hey, I get 10 would those -- would have been the  
22 10 I'd selected? No. You know, this was basically -- it was  
23 handed on me on the understanding that we're going to have  
24 more depositions down the road.

25           THE COURT: Okay.

1           MR. SMITH: So I'm -- again, Your Honor, the Bruce  
2 Robinson, the Charlie Okamoto, we really want to do a  
3 30(b)(6) of Pioneer to finish that out on the other  
4 categories. I think that's important, and then the lease  
5 negotiation witness as well, but I see your --

6           THE COURT: No.

7           MR. SMITH: -- okay.

8           THE COURT: Yeah.

9           MR. SMITH: Fair enough.

10          MR. FRIEDENBERG: Let me respond on what I think are  
11 the two open issues on depositions.

12          Mr. Okamoto, just so it's clear, he's the President  
13 of Gay & Robinson. So to the extent that you are at all  
14 inclined to permit a second deposition of Mr. Okamoto, that  
15 should fall in the same bucket as all the other Gay &  
16 Robinson discovery that Your Honor noted before. Let's wait  
17 and see what Judge Kobayashi does in a couple of weeks, and  
18 then we can make a final decision. There's no reason why he  
19 needs to be deposed in the interim.

20          Second of all, the -- I would still, even if somehow  
21 Judge Kobayashi reversed both of her two prior orders in this  
22 case finding the claims against Gay & Robinson -- identical  
23 claims against Gay & Robinson lacking legally, I would still  
24 argue that it is not proper to redepose a witness who has  
25 been deposed already and whom the plaintiffs had a full

1 opportunity to question on any subject.

2 THE COURT: Well --

3 MR. FRIEDENBERG: That was -- the issue is not  
4 whether Mr. Smith asked every question that he now, with the  
5 benefit of hindsight, wishes he had asked at the time, the  
6 question is whether he had the opportunity to ask those  
7 questions. Otherwise, that would be a way of saying you can  
8 march back any witness for a second deposition as long as  
9 you've deposed him or her at the beginning of the case before  
10 you knew everything you know now and that's obviously not the  
11 rule, particularly --

12 THE COURT: What about the 30(b)(6)?

13 MR. FRIEDENBERG: The 30(b)(6) is, I would say, even  
14 more improper, because what we haven't heard or seen in any  
15 of the many trees that have landed in Your Honor's court, is  
16 any justification for particular categories that have not  
17 already adequately been addressed. The likelihood -- this is  
18 just another way of trying to do more so that they can do  
19 more.

20 THE COURT: Yeah.

21 MR. FRIEDENBERG: They've already deposed the head  
22 of the operation in Waimea. They've deposed the managers who  
23 report to her. They have explored every subject that is  
24 conceivably related to the claims that they're alleging in  
25 this litigation. There's been no showing that there are

1 particular categories that these particular individuals did  
2 not respond to or could not respond to, and Pioneer has been  
3 deposed pursuant to a 30(b)(6) notice already.

4 THE COURT: I thought, actually, they exchanged that  
5 with you. That's not the case, other categories --  
6 information on other categories for a 30(b)(6) deposition.

7 MR. FRIEDENBERG: There were -- well, first of all,  
8 Pioneer was deposed pursuant to a 30(b)(6) notice.

9 THE COURT: Right.

10 MR. FRIEDENBERG: Pioneer -- multiple Pioneer  
11 witnesses were produced to address each of the categories in  
12 the 30(b)(6) notice.

13 THE COURT: Okay.

14 MR. FRIEDENBERG: Subsequent to that time, there may  
15 have been an exchange of additional -- I don't frankly  
16 remember at this point, because it's not part of the showing,  
17 I don't think, that the plaintiffs have made, but there may  
18 have been a request subsequent to that to take a deposition  
19 on additional categories, but what I'm saying is that they've  
20 not taken so many depositions that there is no basis to say  
21 that there are categories that have been -- legitimate  
22 categories that have not been addressed --

23 THE COURT: Okay.

24 MR. FRIEDENBERG: -- by the witnesses, and they're  
25 not making that showing now.

1           THE COURT: Okay. Mr. Smith, here's what we going  
2 to do. I don't know that this issue has been, you know,  
3 fully discussed and addressed between the two of you on  
4 exactly what you want to do as far as an additional 30(b)(6)  
5 deposition.

6           So I want you to conduct a further meet and confer  
7 on this with specific -- very specific matters that you feel  
8 you haven't obtained from Pioneer that you believe you need.

9           MR. SMITH: Okay.

10          THE COURT: And you talk with Mr. Friedenbergr about  
11 that. If you cannot agree, set a discovery conference, and  
12 I'll deal with that particular issue, because I just don't --  
13 I think you're on different --

14          MR. SMITH: Your Honor --

15          THE COURT: -- I'm not precluding it just as a  
16 matter of course, but if these are matters that have been  
17 covered or were part of what was noticed before, then I  
18 probably wouldn't allow it, but if there's a real need for  
19 some additional information here that you really -- you need  
20 this and, you know, it would make sense with some scope and  
21 definition, you know, I might allow it.

22          MR. SMITH: Your Honor, if we've got it already, I  
23 don't want to do the depo, frankly, and there's also -- I  
24 didn't actually remember this until I just looked at the  
25 footnote, but there's a minute order that Your Honor issued

1 allowing the additional 30(b)(6) upon the presentation of the  
2 additional categories, and that's Footnote 39 to our motion.

3 THE COURT: Okay.

4 MR. SMITH: I think we exchanged those categories,  
5 but, Your Honor, my memory is not perfect.

6 THE COURT: Okay. Well, you go over that and --

7 MR. SMITH: So we will redo it. Yeah.

8 THE COURT: -- is that right? You know, I --  
9 there's been so many things going on in this case I don't  
10 remember that myself.

11 MR. FRIEDENBERG: What I would say, Your Honor, is  
12 if a notice had been served, and it designated categories on  
13 which witnesses have already testified, given that we are  
14 beyond the 10 limit -- 10 deposition limit, we would move for  
15 a protective order.

16 Now, what Your Honor is instructing us to do is to  
17 look at the categories, see if we can work it out, and if we  
18 can't we'll come back to Your Honor. That's acceptable to  
19 us.

20 THE COURT: It sounds like maybe I authorized this  
21 once before.

22 MR. SMITH: Here's the --

23 MR. FRIEDENBERG: Well --

24 THE COURT: Take a look at that.

25 MR. FRIEDENBERG: -- if that were the case, that

1 would have been long before all of these witnesses --

2 THE COURT: Oh, okay.

3 MR. FRIEDENBERG: -- were deposed. If that's --

4 THE COURT: Well, that's -- no, you have a point  
5 there.

6 MR. FRIEDENBERG: -- the broader context --

7 THE COURT: You have a point. You have a point. I  
8 mean we're not going to go ahead and just, you know, beat a  
9 dead horse here. If things have been done, you know, we  
10 don't need to do it again. Okay.

11 I'm not -- you know, I'm not cutting you off at the  
12 pass here.

13 MR. SMITH: I understand.

14 THE COURT: You guys talk about it and see what the  
15 deal is.

16 MR. SMITH: Okay.

17 THE COURT: Okay. You know, on Okamoto, you know,  
18 wait until Judge Kobayashi rules.

19 MR. SMITH: Okay.

20 THE COURT: Okay.

21 MR. SMITH: Fine.

22 THE COURT: And then we'll take it up at that point.  
23 Okay. I think that's in on the depositions.

24 MR. FRIEDENBERG: I believe it is, Your Honor.

25 THE COURT: Okay. Then we're going to hold off on



1 the Robinson discovery until there's a ruling on the motion  
2 to dismiss and that takes care of the argument on all of the  
3 duplicative discovery, right?

4 MR. FRIEDENBERG: Well, certainly on the discovery  
5 of the Robinson defendants, yes, Your Honor.

6 THE COURT: Okay. Now, here's an area that I would  
7 like to talk with you a little bit about, other locations.

8 So you want information on what is going on on other  
9 properties. Well, you know, this is very property specific  
10 here about, you know, what was going on in this property and  
11 how it's creating dust exposure and pesticide exposure. Who  
12 cares about other properties? Why?

13 MR. SMITH: Yeah, sure. Here's the reason. So the  
14 key defense for defendants is the Hawaii Right to Farm Act,  
15 which they claim says we can commit nuisance, we can have  
16 pesticides, we can have dust, so long as we're following the  
17 GAMP, the Generally Accepted Agricultural and Management  
18 Practices.

19 It's undefined by the statutes. And so, the  
20 question obviously begged is well what are generally accepted  
21 agricultural practices on Kauai. Okay.

22 THE COURT: Okay.

23 MR. SMITH: So you've got a cast of broader than  
24 that than just that specific property to understand what  
25 those practices are. Now, that was the only reason that we

1 were asking for this discovery. I could -- honestly, I would  
2 see why Your Honor would say (indiscernible).

3 The difference is that in the depositions of --  
4 well, Jill Suga for sure, and this is what I quoted in the  
5 brief --

6 THE COURT: Right.

7 MR. SMITH: -- she said, we had prior dust problems  
8 in Koloa, Lihue, and I think even Kekaha, and there's two big  
9 separate distinctions of Pioneer Hawaii. There's Pioneer  
10 Parent C and Pioneer Waimea Research or Research.

11 So Parent C has dust problems, and they have a very  
12 aggressive protocol for dealing with it and how they go out,  
13 and they respond, and they do all this kind of thing.

14 Waimea, on the other hand, has later dust problems  
15 and doesn't do any of those things. And in fact when they  
16 finally get kind of called on it -- called to the carpet in  
17 front of the County Council, and the Mayor, and all this,  
18 they -- and there's all these internal e-mails going back and  
19 forth, and I've cited one of those, they say, well, Parent C  
20 had had a dust issue at Koloa already, and we should follow  
21 what they did.

22 So what I want to be able to show to the jury is  
23 say, look, when you're trying to figure out what Generally  
24 Accepted Agricultural Management Practices are, yes, it's  
25 relevant what other farmers are doing, but Pioneer didn't

1 even follow its own practices that it had in place that they  
2 did elsewhere, because of dust complaints.

3 And so, our discovery is not simply all locations,  
4 it's limited to two things. It's limited dust complaints at  
5 Koloa and elsewhere -- if they're Pioneer dust complaints --  
6 and it also asks for spray records at Kekaha, and I can  
7 explain why that's relevant as well, but that's the reason  
8 for the dust piece.

9 For the spray record piece, and frankly if Your  
10 Honor wants to carve this down, I'm okay with it. We don't  
11 need this huge, you know, range of spray records, but what we  
12 want to be able to show --

13 THE COURT: Yeah.

14 MR. SMITH: -- is that --

15 THE COURT: I'm disinclined on that, but you want to  
16 know --

17 MR. SMITH: -- yeah.

18 THE COURT: -- what the complaints were, what the  
19 response was --

20 MR. SMITH: That's right.

21 THE COURT: -- in those other areas.

22 MR. SMITH: That's exactly right.

23 THE COURT: Okay. What's wrong with that?

24 MR. FRIEDENBERG: Well, first of all, that is far,  
25 far less than what they've asked.

1 THE COURT: I agree.

2 MR. FRIEDENBERG: So --

3 THE COURT: So you should say God bless them.

4 MR. FRIEDENBERG: -- well, God bless -- I'll say a  
5 qualified God bless them.

6 THE COURT: Okay.

7 MR. FRIEDENBERG: The point, Your Honor -- there are  
8 two points I'd like to make, at least. One is, as Your Honor  
9 noted this is highly property specific, and in fact it is the  
10 plaintiffs who have alleged that this is unique territory.  
11 It is unique topography, it is unique -- there are unique  
12 tradewind patterns. And so, what happens here or what must  
13 happen here is different than what must happen over there.

14 THE COURT: Right.

15 MR. FRIEDENBERG: The second point is the question  
16 is not -- and maybe this is a subsidiary of the first  
17 point -- but the question is not whether Pioneer was really,  
18 really good over there, but whether what it was doing was  
19 generally accepted over here.

20 And so, to go ask about every Pioneer location in  
21 Hawaii, it just -- once again, it has no relevance to what  
22 we're actually trying in this case.

23 THE COURT: Okay. Well, that's not what we're going  
24 to do here. So I do think there is relevance to knowing  
25 about what these complaints were of these other specific

1 locations that you just identified, and what the practices  
2 were, what the complaints were about, and what Pioneer did in  
3 response to the complaints.

4 Okay. That -- I will permit that discovery, and you  
5 folks work it out on the definition of that.

6 MR. SMITH: Okay.

7 THE COURT: Okay. Then we get -- I think the final  
8 area is this inquiry regarding pesticides. And so, you know,  
9 Mr. Smith on this point I kind of agree with the defense  
10 that, you know, to get into all of the health related issues,  
11 the assessment issues that you're interested in, you know,  
12 that just doesn't relate to the claims for property damage  
13 here. That really smacks more of a connection to personal  
14 injury issues or if there were some water -- in other words,  
15 it sounds to me like exactly what I was dealing with, with  
16 the Central Oahu pineapple field water contamination, cancer  
17 causing health hazard case, not the case we have here.

18 So if it relates solely to those questions  
19 concerning the types of pesticides that were being used, and  
20 I gather you know pretty much, you know, what they are and  
21 the like, I mean I certainly would permit that, but not all  
22 of it -- not all of this health-related assessment issue  
23 stuff. Okay.

24 MR. SMITH: I don't -- okay. I see where you're  
25 going with that and, again, as I tried to explain earlier, I

1 don't know that I necessarily disagree. I mean the case is  
2 not about the -- to prove that it's caused -- that these  
3 pesticides have caused, you know, little Johnny's cancer in  
4 Waimea --

5 THE COURT: Right.

6 MR. SMITH: -- but I would disagree from the  
7 standpoint that I think for a jury to be able to evaluate the  
8 impact of the nuisance, it's -- there's a qualitative  
9 difference between just smelling let's say chicken poop or  
10 whatever from a chicken operation or a hog farm. There's a  
11 qualitative difference between that and being subjected to  
12 these very dangerous chemicals that are pesticides.

13 And so, the health component, as far as the dangers,  
14 you know, what the concentrations are, to me that's directly  
15 relevant to the nuisance and what actual trespass occurred to  
16 these people.

17 For example, if I'm exposing you here just to a very  
18 obnoxious perfume or cologne, right, that's different than if  
19 I walked into this courtroom, and I expose you to something  
20 that's got, you know, a -- you know, a very different health  
21 issue. You know, that's a health impact.

22 So I think it's relevant, but I understand Your  
23 Honor's point that that's not the primary focus of the case,  
24 and we're not -- I guess that's what we're trying --  
25 that's -- we're trying to walk that, okay.

1           THE COURT: Yeah, the environmental assessments, you  
2 know, the measures taken by Gay & Robinson to protect honey  
3 bees and other pollinators on agricultural lands, the studies  
4 or investigation undertaken to protect the river from  
5 agricultural runoff and drift, the studies or investigation  
6 to protect the coastal marine environment, the measures to  
7 prevent the runoff or dirt pesticides from the fields.

8           MR. SMITH: Let me --

9           THE COURT: No.

10          MR. SMITH: -- let me just explain, and then  
11 obviously, Your Honor, can disagree with me. The reason I  
12 feel that's relevant here is as I've been saying, and I  
13 certainly believe it, Waimea is an incredibly unique  
14 location. It's right at that mouth of the Waimea Canyon,  
15 there's the ocean, and there's the river.

16          And so, a company that's moving into those specific  
17 fields have different due diligence to do, than a company  
18 that plops down in the middle of Iowa. And that's sort of --

19          THE COURT: Well, I may not disagree with you on  
20 that point --

21          MR. SMITH: -- right.

22          THE COURT: -- but that's not this case.

23          MR. SMITH: But it is this case from the standpoint  
24 of in looking at what those risks are -- let's say we're  
25 worried about runoff in the stream, we're worried about

1 runoff into the ocean, so maybe we should be doing things  
2 like planting windbreaks, maybe we should be doing these  
3 other things for these other practices. That's why it's  
4 relevant.

5           Instead, because they don't look at it, it basically  
6 adds to the reasons why Pioneer was negligent when it moved  
7 in there, and it didn't undertake, you know, these best  
8 management practices. That's --

9           THE COURT: Well, I understand --

10          MR. SMITH: -- that's part of it.

11          THE COURT: -- your point.

12          MR. SMITH: Okay.

13          THE COURT: I understand your point. I disagree --

14          MR. SMITH: Okay.

15          THE COURT: -- but I agree with the defense on this  
16 issue. Okay. Okay. Have we covered everything?

17          MR. SMITH: Yes.

18          MR. FRIEDENBERG: I believe have, Your Honor.

19          THE COURT: Mr. Friedenber, prepare an order that  
20 memorializes all of these points. That's your punishment.

21          MR. FRIEDENBERG: That's your God bless you to me.

22          THE COURT: That's your God bless you to you,  
23 exactly.

24          MR. SMITH: Thank you, Your Honor.

25          THE COURT: Okay, guys, as best you can try to



1 cooperate.

2 MR. FRIEDENBERG: Thank you, Your Honor.

3 THE COURT: We'll get through it.

4 MR. SMITH: Thank you, Your Honor.

5 THE COURT: Always a pleasure.

6 (Proceedings were concluded at 11:51 a.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript  
from the official electronic sound recording of the  
proceedings in the above-entitled matter.



October 29, 2013.

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Jessica B. Cahill, CET\*D-708